1965

Richard F. Mckean v. Mountain View Memorial Estates, Inc., A Utah Corporation and Memorial Estates Security Corporation, A Utah Corporation : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD F. MC KEAN,
Plaintiffs and Respondent

vs.

MOUNTAIN VIEW MEMORIAL ESTATES, INC., A Utah Corporation, and MEMORIAL ESTATES SECURITY CORPORATION, A Utah Corporation,
Defendant and Appellant

Case No. 10697

BRIEF OF APPELLANT

Appeal from Default Judgment of Third Judicial District Court for Salt Lake County, Honorable A. H. Ellett, District Judge.

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STATUTES

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD F. MC KEAN,

Plaintiffs and Respondent

vs.

MOUNTAIN VIEW MEMORIAL ESTATES INC., A Utah Corporation, and MEMORIAL ESTATES SECURITY CORPORATION, A Utah Corporation,

Defendant and Appellant

Case No. 10367

BRIEF OF APPELLANT

STATEMENT OF NATURE OF THE CASE

This is an action by which defendants seek to have a default judgment of the Third Judicial District Court set aside and seek a new trial on the merits of the case.

DISPOSITION IN LOWER COURT

The case was tried without a pre-trial on January 9, 1965, at 9:00 o'clock a.m. Counsel for the Defendants, John Elwood Dennett, Esq. was not present at the beginning of the proceedings but appeared during the course of the proceedings. At the inception of the trial, the Court, on motion of counsel for the Plaintiff-Respondent, entered an order striking the pleadings of the Defendants for not being present and the Plaintiff-

Respondent proceeded in the default of the Defendants. Defendants' counsel appeared in Court at Twenty-seven minutes after nine o'clock a.m. Defendants' counsel was declared to be in default, and a trial in absence of the Defendant Proceeded. A default judgment was entered.

RELIEF SOUGHT ON APPEAL.

Defendants seek reversal of the default judgment and a trial on the merits of the case.

STATEMENT OF FACTS

On the 9th day of March, 1961, the Plaintiff and the Defendant Mountain View Memorial Estates entered into a contract of purchase and sale evidenced by Articles of Agreement (Plaintiff's Exhibit 1) (R 3, R 4, R 5, R 6, R 7). The contract covered land being sold by plaintiff to defendent. The contract did not describe the exact number of acres to be covered, but this was to be determined later by means of a survey (R 5). The only defined purchase price is in the amount of $5,500.00 per acre (R 5). It was established that a survey was conducted (R 5) and that the amount of land to be covered by the contract was 56.87 acres. The payment schedule of the contract was to be made according to the provisions of the contract itself, although the amount left to be paid on the 1st day of November, 1962 as the first installment was left blank.

Plaintiff testified, However, that the amount to be paid under paragraph 2 (a) of the contract on the 1st day of November, 1962, was the amount of $37,881.25 (R 6). Paragraph (c) of the contract provided that the

amount of $500.00 per acre. This amount was paid. The contract provided that certain acres of land were to be released to the Defendants in proportion to the amount of money paid on the contract (Plaintiff's Exhibit 1). The contract also was contingent upon the land remaining and remaining zoned as A-2 by the zoning authorities. The Seller agreed to cooperate in the effort to retain the zoning as A-2 Plaintiff's Exhibit 1).

The Plaintiff received at different times the sum of $17,061.00 and $12,000.00 or total amount was paid to the Plaintiff $29,061.00 Defendant also paid for $1,500.00. Recording fees. This amount does not appear to be in dispute (R 7). The amount of $17,061.00 was a payment in the form of a commission to the Plaintiff McKean for obtaining a sale of the property described and covered by the contract (Plaintiff's Exhibit 1). There is no evidence in the record as to whether the payments received by the Plaintiff were made by Defendant Mountain View Memorial Estates or Memorial Estates Security Corporation. There is also no evidence in the record showing whether or not Plaintiff Richard McKean was at the time of this transaction, or ever was, a licensed real estate agent or broker in the State of Utah. A survey was conducted of the land described in Plaintiff's Exhibit 1 for which partial payment was made by the Defendant Mountain View Memorial Estates (R 18) in the amount of $1500.00.

There is some question as to whether the Plaintiff owned the land which he contracted to sell on the 9th day of March, 1961, as their contract of purchase of the same and was not executed and entered into until the 23rd day

of October, 1961 (Plaintiff's Exhibit 2). The Articles Agreement between the Plaintiff and the Defendants were executed on the 9th day of March, 1961. (Plaintiff's Exhibit 1), roughly six months prior to the contract purchase in which Plaintiff obtained the land. Inconclusive testimony was introduced by witnesses Zeke Erekson in which reference is made to Plaintiff's Exhibit 5, an Earnest Money Receipt, but which Exhibit is not present in the record (R 21.)

There is no testimony in the record as to whether the Defendants or the Plaintiff had possession of the land in question.

There is no testimony as to the value of the land, no testimony as to its rental value, no testimony as to whether or not there was a loss of an advantageous bargain, no testimony as to whether there was any damage to or depreciation of the property, no testimony as to whether there was any decline or increase in value due to the change in market value on the property.

The contract between the Plaintiff and Cottonwood Heights Fur Farm, from when plaintiff obtained the land involves approximately double the amount of land sold in the Articles of Agreement to the Defendant Mountain View Memorial Estates. (Plaintiff's Exhibit 1 and 2)

STATEMENT OF PROCEDURAL FACTS IN THE PLEADING, PRE-TRIAL, AND TRIAL OF THE INSTANT CASE.

Sometime more than a week prior to the trial, the Court attempted to pre-try the action and was unable to obtain agreement or stipulation from parties without impossible

sections R 1 and R 2). The Pre-trial was continued to January 9, 1965. Counsel was ordered to have all witnesses present. On the Thursday preceeding Saturday, January 9, 1965 the Honorable Judge A. H. Ellett had the attorneys counsel and advise him that since all witnesses would be present, it would be easier to try the case rather than to pre-try it. July 9th, a Saturday at 9:00 o'clock a.m. was set as the time for trial. Counsel for Defendants John Elwood Dennett called the court the next proceeds to the trial setting and indicated his intention to obtain a writ from the Supreme Court prohibiting the District Court from proceeding with the trial.

Counsel for Defendants also attempted to obtain a stipulation for a continuance from Counsel for Plaintiff but was unable to do so. He requested a continuance from the Trial Court at approximately 5:00 o'clock p.m. on the day previous to the trial, but such continuance was denied. The following morning, January 9, 1965, counsel for Defendants appeared at the Supreme Court with a Writ of Prohibition, thinikng that if the writ were denied, he could nevertheless be present in Court in sufficient time to try the case. When it became obvious that he could not contact the Chief Justice of the Supreme Court in time to obtain a determination on the Writ of Prohibition and also be in the Court to try the case, counsel for the Defendants called from the Supreme Court at approximately 8:55 o'clock a.m. and advised the Court that he was attempting to obtain a writ. Counsel was advised by the Court that the Court would proceed in his absence. The conversation was terminated at 8:59 o'clock a.m.

Counsel for Defendants delayed in the Supremect

long enough to talk to the Chief Justice of the Supreme Court and then went to the trial, arriving twenty-seven minutes late. (R 38, R 39, R 40) Upon arriving in Court, he was advised that he and his clients were in default and that he had no standing before the Court. Counsel was denied the right of cross examination, the right to present Defendant's witnesses and the right to testify himself (R 16, R 17, R 18, R 19, R 20).

The Court offered to counsel for Defendants the opportunity of serving as a friend of the Court for the purpose of determining damages. Counsel declined in order to avoid waiving any rights (R 22, R 23)

Following the trial, counsel for the Defendants made a motion to strike the proceedings held in the nature of a trial, moved the Court and demanded a jury trial, made a motion to strike the default and permit cross examination of the witnesses and proffered proof showing (a) an additional contract between the Plaintiff and the Defendant Memorial Estates Security Corporation pursuant to a secondary agreement. (b) that payments were made subject to property being released under the provisions of paragraph 4 of the Articles of Agreement, and that there were other provisions of a contractual agreement between the Defendant Memorial Estates Security Corporation and the Plaintiff. (c) that payments made on the property were made pursuant to invoice received from Plaintiff and payment was pusuant to a separate agreement between Memorial Estates Security Corporation and is not based on the contract with Mountain View Memorial Estates (R 52, R 51).

(c) that the Plaintiff had no interest in the property at the time it was sold.

(d) That there was a previous breach of contract by [illegible] prior to any breach by either of the Defendants, (e) that the Plaintiff had at the time of trial and had had [illegible] possession of the property, (g) that Plain[illegible] had the property zoned in violation of the agreement which constitutes a further breach of the contract, [illegible] other conditions. Counsel for the Defendants also made a motion for a new trial. All of the motions of the counsel for Defendants were denied.

ARGUMENT

POINT I

The trial Court erred in denying to the Defendants the motion to set aside the default and for a new trial. The pleadings and transcribed record are not entirely clear as to the various stps taken by counsel to arrive at a point of pre-trial of this case. Evidently, however, they were beset with problems as is evidenced by the filing of a motion to dismiss for the Defendants (R 13), a motion and order extending time in which to answer (R 18, R 19), motion for a default judgment and awarding of expenses (R 32, R 33) which motion was based on the failure of the Defendant Mountain View Memorial Estates to appear for deposition and the order granted by the same judge trying the case. Counsel for the Defendants was ordered to pay the sum of $75.00 attorney's fees in order to avoid the default judgement (R 35), and the testimony of the Court (R 1 & 2) a proceeding between the Court and counsel for the Defendants (R 16, 17, 18,

19) and further testimony as to the conversation between the Court and counsel for the Defendants as indicated on pages R 31, 32, 33, 34, 35, 36, 37, 38, 39 and the further rebuttal testimony of Richard Wilkins, counsel for the Plaintiff on pages R 41, 42, 43, 44, 45.

In view of the record, it may well be that the Court had sufficient grounds to find counsel for the Defendants in contempt of Court. It would further appear that notwithstanding the action taekn by the District Court having been called a default, it was either (1) a default with a subsequent striking of the pleadings, or (2) a contempt with a subsequent striking of the pleadings.

If the action taken by the Court was in the nature of a contempt, the striking of the pleadings and subsequent Limitation of Defendants right of a trial on the merits was in violation of the due process clause of the Fourteenth Amendment of the United States Constitution. The United States Supreme Court in Hovey v. Elliott, et al, May 24, 1897, 167 United States 409, 42 L. ed. 215 17 Supreme Court 841, the Court there stated:

> While a party in contempt is not entitled to be heard as to matters of mere favor, yet it is a denial of due process of law to strike out an answer and render a decree pro confesso as a punishment for contempt.

There have been a series of cases affirming the decision in Hovey v. Elliott and an annotation of them is found in 14 ALR 2nd page 580. In section 5 there under, *Constitutional Limitations on Power of Court*, the annotation recites:

> Courts have no inherant power to punish contempt by denying a hearing to the contemner and striking

[illegible] proceedings or entering default judgment or dismissal against him since one of the fundamental conceptions governing a Court of Justice is consummated only after a hearing, and an order of [illegible] denying the contemner a right as distinguished from granting a favor is void for one of due process of law as violation of the 14th Amendment of the Federal Constitution or a comparable provision of the applicable State Constitutions.

The State of Utah has a unified bar which is governed by a Board of Commissioners. Admission of qualified, competent, responsible candidates for the bar for the purpose of practicing Law has been determined by the Legislature in Utah annotated, 1953 (17-51-10):

> The Board of Commissioners shall have power to determine the qualifications and requirements for admission to the practice of Law and to conduct the examination of applicantts and it shall from time to time certify to the Supreme Court those applicants found to be qualified; . . . the State Bar, the Board of Commissioners of the State Bar Association shall also have authority to govern the conduct and to discipline members of the Bar

Title 78-51-12:, Utah Code annotated, 1953

> The Board shall establish rules governming the conduct of all persons admitted to practice, and shall investigate and consider and pass upon all unethical, questionable or improper conduct of any person admitted to the practice of the Law, including members of the Bar holding judicial office. The Board shall also establish rules governing procedure in cases involving alleged misconduct of members of the Utah State Bar, including those holding judicial

> office, and may create committees for the purpose of investigating complaints and charges which committees may be empowered to administer discipline including recommendation of suspension or disbarment from the practice of Law in the same manner as the Board itself . . .

The Courts of general and superior jurisdiction possess inherent power, not derived from Statute, to suspend, disbar and reinstate attorneys, see In Re Evans, 42 Utah 282, 130 Pacific 217, and annotations in 32 ALR 1068. In State of Utah vs. Earnest Hines and James Leach, February 28, 1957, 6 Utah 126, 307 Pacific 2d 887, the Court stated:

> The privilege of an accused to the assistance of counsel is one of the fundamental rights and it means the right to a reputable member of the bar who is willing and in a position to honestly and conscientiously represent the interests of the Defendant and to present such defenses as are available to the Defendant under theLaw and consistent with the ethics of the profession.

In the event the default of the Defendants was entered as a result of acts or omissions appearing and not appearing of record which caused the Court to conclude that it was obligated to take such action to preserve the integrity and dignity of the Court. It is respectfully submitted that the Defendants themselves should in no wise be punished for the acts and omissions of counsel which counsel was selected by the Defendants from among the active members of the Utah State Bar Association The responsibility for maintaining and certifying as to fitness for practice of which falls upon the Utah State Bar

The default in appearing twenty-seven minutes late

present the case of the Defendants in Court after advising Court that counsel for the Defendants was in the Supreme Court of the State of Utah, seeking to have a Writ of Prohibition was not such a lapse or delay as to justify imposing a default on the Defendants themselves and it is submitted that the Lower Court was in error in denying a motion to set aside that default.

In the case of Peterson vs. Taylor, District Court of Appeal, 2nd District of Division 1 in California, dated October 13, 1944, a default was imposed where counsel arrived twenty-four minutes late, and offered a reasonable excuse for his tardiness. The Court held:

> Where a default judgment has been entered merely because counsel for the Defendant was twenty-four minutes late in arriving at Court, and particularly where such counsel has proffered a reasonable excuse for his tardness, substantial justice requires such judgment to be vacated in order that the action in question may be tried on its merits.

This decision is consistent with the Utah Rules of Civil Procedure Rule 55- C and 60-B and also consistant with the decisions under Federal Rule 55-C which state:

> For good cause shown, the Court may set aside an entry of default, and if a judgment by default has been entered, it may likewise set it aside in accordance with Rule 60-B.

This case follows the majority decisions in the State and Federal Courts of the United States, and this Court has said in Heatman vs. Fabian, 14 Utah 2nd, page 60, 377 Pacific 2nd 189:

> No one has an inalienable or constitutional right to

> a judgment by default without a hearing on the merits. The Courts in the interest of justice and fair play favor, where possible will grant a full and complete opportunity for hearing on the merits.

In the instant case, it appears that merits left to be tried and not heard by the Court, and which were raised by the Defendants in their pleadings, consist of the following:

1. Whether Defendant Memorial Estates Security Corporation was an Assignee of Mountain View Memorial Estates or whether it held its interest in the property independent of the contract of the Plaintiff with Mountain View Memorial Estates.

2. Whether the funds received by the Plaintiff were properly applied to the contract and whether the amount of $17,061.00 was received as a real estate commission by a person not licensed as an agent or broker, and whether such sum should therefore not be applied to the contract or returned to the payor.

3. Whether the Plaintiff Richard McKean and LaVar H. Whittaker were in fact partners and whether the property subject of this appeal was partnership property and whether the case might be subject to dismissal based on a misjoinder or because of a failure to join an indispensable party.

4. Whether there actually had been a payment by one or both of the Defendants which would have satisfied the provisions of the contract.

5. Whether the conditions and circumstances under which Memorial Estates Security Corporation held an interest in the land was independent of Memorial Estates

[illegible] if so whether the interest of Memorial Estates Security Corporation could be terminated without a refund to that Defendant of all monies paid.

[illegible] Whether there has been any damage to the Defendant by virtue of a loss of an advantageous bargain or whether there has been any damage to or depreciation of the property or whether there has been any decline or increase in the value of the property due to a change in market value, and whether any increase in the value of the property should not be a credit to the defendants as offset to any damages claimed by the Plaintiff, and a determination of the fair rental value of the property during the period occupied by the Defendants.

[illegible] Whether the property, during the period indicated by the contract, was actually occupied by the Defendants or whether the property had been taken back into possession by the Plaintiff at some previous date.

POINT II

The Court erred in granting judgment against Memorial Estates Security Corporation. Nowhere in the record is there any indication of the nature of the agreement between Memorial Estates Security Corporation and the Plaintiff. There is no record that Memorial Estates Security Corporation was at any time bound by the contract between Plaintiff and the Defendant Mount View Memorial Estates (Plaintiff's Exhibit I). Consequently, a determination should be made by the Court as to how much money was actually paid to the Plaintiff and under what conditions and what contract, and whether funds paid by Defendant Memorial Estates

Security Corporation are subject to forfeiture. The record is devoid of any evidence governing these points and will not support Findings of Fact or a Decree against Memorial Estates Security Corporation.

POINT III

The Court erred in determination of damages. The law of the State of Utah with respect to forfeiture has been laid down by the Utah State Supreme Court in the Pearce et al, vs. Spencer, et al, Ix. of April 21, 1952, 121 Utah 468, 243 Pacific 2nd 446. In that case the Court cites the case of Young vs. Hansen, 117 Utah 591 218 Pac. 2nd 666. . . .

> "The contract did not provide for retention of the money, and even if it did, it is questionable that such a provision could be enforced, as Defendants would acquire an unconscienable advantage and be unjustly enriched at the expense of the Plaintiffs as there is no showing that Defendants have suffered any damages."

The Court goes ahead to lay down the rule governing damage and forfeiture, and states:

> The vendors are entitled to any loss occasioned to them by any of these factors; (1) loss of an advantageous bargain; (2) any damage to or depreciation of the property; (3) any decline in value due to change in market value of the property not allowed for items No. 1 and 2; and (4) for the fair rental value of the property during the period of occupancy.

This decision has been followed by the Utah State Supreme Court. It is also found in Restatement of Con-

...cts paragraph 357, page 623. See also Cole vs. Parker, ... Pacific 2nd 623, 5 Utah 2nd 263, and Jacobsen vs. ...an, 278 Pacific 2nd 294, 3 Utah 2nd 59. In none of these ...es does the Court determine damages based on the ...ount of interest of the total contract in the instant ... the trial Court (R 30, 31, 32, & 33) bases the ...feiture of the total payment of $29,061.00 on damages ...ulated on interest bases on the entire contract. In none ... the cases decided by the Utah State Supreme Court ...es the Court indicate that interest shall be one of the ...easures of damages in a case where forfeiture is al... ...ed. If it was the intention of the Court to measure ...ental value by the interest, then the assumption must ... made that the interest at a rate determined by the ...urt would be the same as the rental value of the land.

There was no testimony taken whatsoever with respect ... the rental value of the land. Neither was there any ...estimony taken as to the loss of an advantageous bargain, damage or depreciation of the property, decline or increase in the value due to the change of market value. It is conceivable that if testimony had been taken from the Defendants, and if cross examination had been allowed that the property could be shown to be worth considerably more at the time of trial than at the time of the purchase agreement. The Defendants respectfully submit that there is inconclusive evidence in the record to establish damages according to the criteria set down by this Court.

POINT III

The Court erred in entering judgment against Memorial Estates Security Corporation. Nowhere in the

record is there any evidence against Memorial Estates Security Corporation. Nonetheless there is evidence to the effect that Memorial Estates Security Corporation paid certain funds to the Plaintiff. The record does not yet established the relationship between Memorial Estates Security Corporation and the Plaintiff.

POINT IV

The Court erred denying the motion of counsel for Defendants for a jury trial. The Court stated that it felt that this an equitable proceeding R-49 and R-34. It is respectfully submitted that there were many facts to be determined in the instant case, and that had evidence been taken from the Plaintiff and Defendants and had cross examination been allowed, some of these facts which would be necessary for the judgment of the Court would be the following:

1. Whether the Plaintiff and Whittaker, or their partnership, held title to the land in question.

2. Whether there was a separate agreement existing between the Plaintiff and Memorial Estates Security Corporation.

3. If so, how much of the consideration paid was paid by Defendant Mountain View Memorial Estates and how much was paid by Memorial Estates Security Corporation.

4. The amount of the rental value of the property the loss of bargain, if any, to the Plaintiff, the enhancement or depreciation of the property, or any damage or depreciation to the property.

s. Whether Plaintiff McKean was entitled to accept commission in the amount of $17,061.00 which he collected from the Defendants, or whether the payment of that amount must necessarily be considered also a partion of the paid purchase price.

CONCLUSION

a. Defendants respectfully submit that whatever the situation was, which existed between their counsel, John Elwood Dennett and counsel for the Plaintiff and the Court, that in the interest of justice, the Defendants should not be punished for the acts and/or omissions of their counsel.

b. The Defendants have a meritorius Defense which has never been heard by the Court.

c. The Court erred in its decision because it had not heard all of the fact, and a new trial on the merits is necessary to bring all the facts before the Court.

Defendants Respectfully request that the case be remanded for a new trial on the merits.